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In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1924

CHANG CHAN, WONG JUNG KAY, YEE SIN JUNG, and JIN HING WAH, Petitioners,

and

CHAN SHEE, KON SHEE, WONG SHEE, and NG YUET SEUNG, Detained on Habeas Corpus,

Petitioners and Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Respondent and Appellee.

BRIEF FOR PETITIONERS AND APPELLANTS

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CHAN SHEE, KON SHEE, WONG SHEE, AND NG YUET SEUNG, DETAINED ON HABEAS CORPUS,
Petitioners and Appellants.

vs.

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO,
Respondent and Appellee.

No. 770

BRIEF FOR PETITIONERS AND APPELLANTS

STATEMENT OF FACTS

This action went to the Circuit Court of Appeals for the Ninth Circuit upon appeal from the judgment of the United States District Court for the Northern District of California, Southern Division thereof, Second Division, in favor of John D. Nagle, Commissioner of Immigration for the Port and District of San Francisco, respondent in the District Court, and against Chang Chan, Wong Jung Kay, Yee Sing Jung, Jin Hing Wah, Chan Shee, Kon Shee, Wong Shee and Ng Yuet Seung, the petitioners and detained in the District Court, and the petitioners and appellants before this Court.

The action was to relieve the detained petitioners of the restraint imposed by the appellee. The petition for habeas corpus was prayed for by the first four named appellants, and alleges that they are each citizens of the United States, and that the last four named appellants are respectively their wives who arrived at the port of San Francisco on the S. S. President Lincoln, July 11, 1924, and sought the right of permanent admission into the United States upon the ground that each of them is the wife of one of the petitioners before the court, each of the latter being a citizen of this country and permanently domiciled therein, as in each instance specifically set forth in the petition. They were each awaiting a setting of their cases for trial by the Commissioner of Immigration and had the necessary witnesses all in readi-

ness to appear for examination to establish their right of admission into the United States, each as the wife of a citizen of the United States and admissible as such under the terms of the treaties between the United States and China and the Chinese Exclusion and Restriction Acts, and the rules and regulations promulgated thereunder. The Commissioner of Immigration did not accord the contemplated hearing, but caused each of the said applicants, that is the wives, to be solely examined in her case before a board of special inquiry, which thereupon denied each of them admission into the United States under the provisions of the Immigration Act of 1924, which became effective July 1, 1924, and after the date of the respective marriages of appellants. No attempt was made to permit the husbands of these women a chance to be present or heard at said board hearing. An appeal was at once taken to the Secretary of Labor, where suitable protests and briefs were filed, after which the Secretary of Labor dismissed the appeal in each instance and affirmed the excluding decision. The excluding decision was substantially the same in each case, and by way of illustration that of Ng Yuet Seung, the last-named appellant herein, will suffice, the ground for the Secretary's adverse ruling being as follows:

> "This is the case of a young Chinese woman who arrived at the port of San Francisco on July 11, 1924, after the present law had become effective, and seeks admission as the wife of a citizen.

> Neither the citizenship of the alleged husband, nor the relationship of the applicant to him, has been investigated for the reason that even if it were conceded that both elements exist she would still be inadmissible, as Section 13 of the Act of 1924 mandatorily excludes the wives of United States citizens of the Chinese race if such wives are of a race or persons ineligible to citizenship, and the department has no alternative than to recommend exclusion."

The petition alleges that there has been a misconstruction and a mistaken and wrongful interpretation of the Immigration Act of 1924, the effect of which has been to violate the treaty and statutory rights of appellants, as specifically recognized in the Act itself, and said incorrect statutory construction violates and disregards the treaty, statutory and constitutional rights of appellants, who are citizens of the United States, and their wives who were and are persons of the Chinese race. The petition was supplementally amended by filing the original immigration records in the case of each of the detained, and as so amended the appellee interposed a general demurrer, which was sustained by the lower court on October 25, 1924, which thereupon refused to issue the writ of habeas corpus, as prayed for, and denied the petition, after which the case was immediately appealed by the citizen husbands and their wives as appellants herein, and docketed in the Court of Appeals.

The lower court in the case at bar disapproved the

ground of rejection of the Secretary of Labor, and held that Chinese women ineligible to naturalization who had become and are the wives of citizens of the United States, are entitled to admission under the terms of the Immigration Act of 1924, but bases denial of the petition upon a ground not made by the Board of Special Inquiry at the port, nor the Secretary of Labor on appeal, nor at the hearing before the lower court, the concluding portion of the decision of the lower court being as follows, 2 F. (2d) 995:

> "I conclude therefore that it would have been the duty of the respondent in the case now under consideration to permit the petitioners to enter if their husbands, being citizens of the United States, had complied with the provisions of Section 9, Subd. (b), (c) and (d), of the Act by filing with the Commissioner-General the petition therein specified, resulting in the issuance to said petitioners of an immigration visa by the consular officer to whom application therefor has been made. But as it appears that no such proceedings were taken by or on behalf of the petitioners, they have not established their right to enter. The demurrer to the petition is therefore sustained."

The wives in detention were upon the high seas en route to the United States on July 1, 1924, when the new Immigration Act became effective. The rules and regulations promulgated by the Commissioner-General of Immigration, with the approval of the Secretary of Labor, on July 1, 1924, No. 55266/General, Document No. 904, Chinese Rules and Regula-

tions under the Immigration Act of 1924, conclude as follows:

> "Under the new law no Chinese alien wife or alien child of the Chinese race of an American citizen is admissible solely because of such relationship to such person."

And Document No. 922, issued by the same authority, provides in part as follows:

> **"IMMIGRATION QUOTAS ACCORDING TO NATIONALITY PROCLAIMED IN PURSUANCE OF THE IMMIGRATION ACT OF 1924. THESE QUOTAS ARE AVAILABLE ONLY TO ALIENS WHO ARE ELIGIBLE TO CITIZENSHIP IN THE UNITED STATES.**
>
> **Country or Area of Birth**
>
> | | Annual quota |
> |---|---|
> | *China | 100* |
>
> *For each of the countries indicated by an asterisk (*) is established a nominal quota according to the minimum fixed by law. These nominal quotas, as in the case of all quotas hereby established, are available only for persons born within the respective countries who are eligible to citizenship in the United States and admissible under the immigration laws of the United States."

The immigration visa mentioned was impossible of procurement by the appellants under the rules and regulations as stated, and would have been ineffective if presented under the department's rulings of inadmissibility on account of race.

CERTIFIED QUESTION

Upon the foregoing statement of facts the Circuit Court of Appeals for the Ninth Circuit certified to this Court the following question:

1. Should the petitioners be refused admission to the United States either (a) because of the want of a visa; or (b) because of want of right of admission if found to be Chinese wives of American citizens?

As will be perceived, even in the event of an answer favorable to the petitioners the questions of the American citizenship of the husbands and the relationship of the wives remain to be passed upon by the lower courts.

SHOULD THE PETITIONERS HAVE BEEN REJECTED FOR WANT OF AN IMMIGRATION VISA?

This, the first question arising under the certification of the Circuit Court of Appeals, we shall discuss but briefly, for the reason that we consider the whole case in its broader aspects as it arises under (b) of the certification, and such discussion lies at the bottom of the question of the necessity and effect of any visa. Nevertheless, there are certain considerations to be now invoked.

At the time the Immigration Act of 1924 went into effect in its fullness—July 1—the petitioners were on the high seas and the instructions of the Department of Labor were only on the point of issuance. There

was, therefore, a physical impossibility that the petitioners should comply with regulations that so far as they were concerned were in the womb of time when they departed from China. We may quote the Latin maxim: "Lex non cogit aut impossibilia aut inutilia." Surely impossibility and inutility are words directly applying in the present situation.

In principle the case of *Tsoi Sim* vs. *United States,* 116 Fed. 920, 923, directly applies as showing that the doing of a vain thing is to be avoided. In that case a Chinese woman laborer had not registered as required by law. She married an American citizen and immediately after was arrested as having been a non-registered Chinese laborer subject to deportation. The Court of Appeals for the Ninth Circuit then said:

> "If appellant was to be deported she would have the unquestioned right to immediately return, and would be entitled to land and remain in this country, upon the sole ground that she is the lawful wife of an American citizen."

The court, therefore, refused to deport a woman who might so easily and properly re-enter. We have the right to ask that these wives of American citizens, like Tsoi, should not be made the victims of vain formality.

So also the case of *In re Leong Yick Dew* (19 Fed. 490), decided by the Circuit Court for the District of California, February 25, 1884, in which was involved the construction of a portion of the first Chi-

nese Exclusion Act of May 6, 1882, wherein the court held as follows:

> "Again, the same section which required the certificate gives to the departing Chinese laborer an absolute, indefeasible right, without cost or expense, to have the certificate, in order that he may be able to produce it as evidence of his right to reenter the United States. The necessity to produce it, and the right to have it, in order that he may produce it, are correlative conditions. The one provision is the complement of the other. They are reciprocal, and must go together. The obligation to produce the certificate presupposes the practicability, or, at least, the possibility, of procuring it, in order that it may be produced. The two provisions go together, and form but one legal conception. The obligation to produce and the right and ability to obtain it are *dependent,* and *not independent,* conditions. One is the counterpart of the other, and it is not to be supposed that Congress would have adopted one branch of the proposition without the other, otherwise it would have distinctly done so in terms. If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or if intended, it must be void. The law requires nothing impossible—*Lex non cogit ad impossibilia* (Bouv. Law Dict. "Maxims"; Broom, Max. 242) and *Lex non intendit aliquid impossibile* (Bouv. Law Dict.)—the law intends not anything impossible—are among the most venerable maxims of the law. In a statute, 'No text imposing obligations is understood to demand impossible things.' Sedg. St. Law, 191. * * *."

We have already set forth in the Statement of Facts the conditions surrounding the issuance of immigration visas, showing that even if application therefor had been possible, issuance would have been refused these petitioners. Surely, therefore, the petitioners should not be condemned to deportation, as they were by Judge Kerrigan, for not doing an act which, even if sought to be performed or if visa had been granted, would have meant nothing to the Department of Labor.

THE IMMIGRATION ACT OF 1924 AS AFFECTING THE ISSUE IN THIS CASE

Under the heading of "non-quota immigrant" Section 4 provides that:

> "When used in this Act the term 'non-quota immigrant' means—
> (a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under Section 9."

Section 5, under the heading of "quota immigrants," provides that:

> "When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of

any other law regulating or forbidding immigration."

Section 8 provides that:

"A consular officer may, subject to the limitations provided in sections 2 and 9, issue an immigration visa to a non-quota immigrant as such upon satisfactory proof, under regulations prescribed under this Act, that the applicant is entitled to be regarded as a non-quota immigrant."

Section 9 (a) provides that:

"In case of any immigrant claiming in his application for an immigration visa to be a non-quota immigrant by reason of relationship under the provisions of subdivision (a) of Section 4, or to be entitled to preference by reason of relationship to a citizen of the United States under the provisions of section 6, the consular officer shall not issue such immigration visa or grant such preference until he has been authorized to do so as hereinafter in this section provided.

(b) Any citizen of the United States claiming that any immigrant is his relative, and that such immigrant is properly admissible to the United States as a non-quota immigrant under the provisions of subdivision (a) of section 4 or is entitled to preference as a relative under section 6, may file with the Commissioner-General a petition," etc.

Let us pass now to paragraph (e) of Section 9:

"If the Commissioner-General finds the facts stated in the petition to be true, and that the immigrant in respect of whom the petition is made is entitled to be admitted to the United States as a non-quota immigrant under subdivision (a) of

section 4 or is entitled to preference as a relative under section 6, he shall, with the approval of the Secretary of Labor, inform the Secretary of State of his decision, and the Secretary of State shall then authorize the consular officer with whom the application for the immigration visa has been filed to issue the immigration visa or grant the preference."

The only limitation discoverable in this section upon the right of entry of a wife of a citizen of the United States, or indeed, up to this time in the Act, is contained in the following paragraph which has no application to the cases now under consideration but which reads as follows:

"(f) Nothing in this section shall be construed to entitle an immigrant, in respect of whom a petition under this section is granted, to enter the United States as a non-quota immigrant, if, upon arrival in the United States, he is found not to be a non-quota immigrant."

Apparently the only purpose of clause (f) is to prevent the perpetration of a fraud on the part of someone not entitled to enter as a non-quota immigrant or not entitled at all to enter as a quota immigrant.

We turn next to Section 13 which in its subdivision (a) provides:

"No immigrant shall be admitted to the United States unless he * * * (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws."

We next come to clause (c) of Section 13:

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3."

For the purpose of explanation we recur to subdivisions (b), (d) and (e) of Section 4 and find that (b) covers immigrants previously lawfully admitted to the United States, returning from a temporary visit abroad, (d) certain immigrants entering for the purpose of carrying on the avocation of minister, college or other professor, and their wives and unmarried children accompanying or following them, and (e) student immigrants.

A study of the provisions we have cited shows that by clause (a) of Section 4, using the broadest language, the unmarried children under 18 years, or the wife, of an American citizen is a non-quota immigrant and we add whether she or the child be of Chinese or of any other race. As such it is the duty of the consular officer to issue a visa. The wife, for instance, does not have the right of entry because related to a non-quota immigrant or a non-immigrant, or because of being excepted from the operation of any other law regulating or forbidding immigration, as provided in

Section 5, but because she is the wife of an American citizen and her domicile is the domicile of her husband.

We find again under Section 8 that the consular officer, on satisfactory proof being furnished him that the applicant is entitled to be regarded as a non-quota immigrant, may issue an immigration visa to her.

Going further, in Section 9, clause (b), any citizen of the United States claiming her as his wife under provisions of subdivision (a) of Section 4, may file a suitable petition and under clause (e) of the same section the Commissioner-General finding the facts to be true and that she is entitled to be admitted to the United States as a non-quota immigrant under subdivision (a) of Section 4, shall inform the Secretary of State of his decision and the Secretary of State shall then authorize the consular officer with whom the application for the immigration visa has been filed, to issue it, the only limitation upon the right to enter, consequent upon such action, being that if she seeks to enter as a non-quota immigrant she shall not do so if, on arrival, she is not found to be that sort of immigrant, and so far as we are concerned that kind of immigrant must be the unmarried child under 18, or a wife, of a citizen of the United States, residing therein at the time of the filing of the petition.

A review of these sections and clauses shows beyond a peradventure that the right of Chinese wives of

American citizens to receive due authorization to enter the United States cannot be disputed, whatever debate may arise as to the effect of other portions of the Act.

We come now to Section 13 and in its clause (a) we find that the Chinese wife of an American citizen has a right to admission as a non-quota immigrant if specified in the visa in the immigration visa as such and otherwise admissible under the immigration laws, the latter clause finding its natural purpose in the provisions as to health and character of broad general nature.

We are next confronted with clause (c) of Section 13 prohibiting not the granting of visas, which in themselves recognize a right to admission, but prohibiting admission except under the provisions of subdivisions (b), (d), and (e) of Section 4 or because not an immigrant as defined in Section 3. The provisos (b), (d) and (e) we have before pointed out.

This course of analysis has brought us to a point of plain contradiction in the law. The right to admission has been fully recognized three or four times over through the provisos directing the granting of said visas and it is now argued that if a visa must be granted, and such right cannot be disputed, yet the wife of an American citizen leaving China in the high hope of accompanying or joining her husband is to be turned back on reaching an American port because "ineligible to citizenship." The two interpretations

cannot stand. The right to papers authorizing admission is as strong in itself, as stated in the statute, as any power of rejection because ineligible to citizenship can possibly be believed to be.

The result of this analysis brings us to a point where we must give weight to the purposes and intent of Congress. This we shall next show by the reports of the committees and the statements of the committee chairmen on the floor of the House. It is evident that they did not, at any moment, intend by this legislation to exclude from American soil the wife of any American citizen. In one section after another, in the most unqualified manner, and seeking only to establish the fact of relationship, we have seen that the purpose and intent of Congress not to sever the family relationships of American citizens was iterated and reiterated. With the opportunity before Congress in Sections 2, 4, 5, 6, 7, 8, and 9, the suggestion was never made that families were to be broken up because of a chance that a wife was ineligible to citizenship.

The only doubt or question which arises under the Act is because while in Section 13 express reference is made to subdivisions (b), (d) and (e) of Section 4, by some apparent slip no reference was made to subdivision (a) of Section 4 referring to the unmarried children under 18 years or the wife of a citizen of the United States.

That there was nothing but a slip and that the intent of Congress was unmistakably shown by all the prior

sections to which we have alluded is only made the stronger by reference to subdivisions (d) and (e). Under (d) we find that a Buddist missionary, or a Chinese instructor, with his wife and unmarried children may come into the United States and following his occupation remain here for the remainder of his life with his wife and children under 18 entering with or following him.

Can we believe that it was the purpose of Congress to throw wide open the doors of the United States to classes of men with their wives who may enter this country for the purposes, it may be, of profit or other gratification incident to the carrying on of their business, and refuse entry to the wife of an American citizen who is clearly entitled to a visa and who may be the mother of American citizens who are entitled to entry whatever their race or wherever born?

This is not a case, as it happens, of reading into the statute a provision or a clause which is not there, but one of giving full effect and meaning to provisions which are there and carrying out with relation to them the manifest and avowed intent of Congress.

COMMITTEE REPORTS AND STATEMENTS OF CHAIRMEN SHOWING INTENT OF CONGRESS

In the two House Reports (No. 176 as of H. R. 6540, and No. 350 as of H. R. 7995) the Committee says:

> "The Bill • • • exempts wives, children under 18, and parents over 55, of American citizens."

Elaborating the statement the reports add:

> "In the bill provision is made for the admission without count in any quota of the fathers and mothers over 55 years of age, the husbands and wives, and the unmarried children under 18 years of age, of citizens of the United States."

On neither occasion in the reports is exception made of those of Asiatic origin.

While we may not look back to the debates to discover the intent of Congress (though they would help us) we can, in addition to the Committee Reports, cite the declarations of the Committee Chairmen. Thus doing, we find that on April 5, 1924, Chairman Johnson of the House Committee declared on the floor of the House (Congressional Record, Vol. 65, p. 5852) that one of the main purposes of the Bill was to prevent the separation of members of families. Many paragraphs, he says, have been provided "to reduce the hardships of those who come as immigrants" (p. 5843).

Senator Reed of Pennsylvania, author and manager

on the floor of the Senate of the Senate Bill, emphasized the humane objects of the measure (Record of April 3, 1924, Vol. 65, p. 5671). Senator Colt, then Chairman of the Senate Committee on Immigration, in explaining the purposes of the bill to the Senate on April 2, 1924, called attention to the general humanitarian objects which Congress had in view (Congressional Record, Vol. 65, p. 5596). Senator Spencer introduced an amendment, which was adopted, and which now forms the proviso to Section 14 of the law, permitting the Secretary of Labor to allow to remain permanently in the United States any alien child theretofore temporarily admitted, now in the United States, either of whose parents is a citizen of the United States (Cong. Record, Vol. 65, p. 6865).

DECISIONS OF LOWER COURTS AS TO RIGHT TO ADMISSION OF CHINESE-BORN WIVES OF AMERICAN CITIZENS

The question involved in this case was first brought into court in the United States District Court of the Western District of the State of Washington, Northern Division, and was decided by Judge Neterer on September 23, 1924, in ex parte Goon Dip and others. 1 F. (2d) 811. Judge Neterer reviewed the treaty and statutory provisions as touching the matter of Chinese merchants and the decisions bearing thereon, including *Chung Toy Ho,* 42 Federal, 398; *United States* vs. *Gue Lim,* 176 U. S., 459; and *Tsoi Sim* vs. *United*

States, 116 Fed., 920; thereafter calling particular attention to the majority report of the Committee on Immigration and Naturalization in which it was said:

> "The bill * * * exempts wives, children under 18 * * * of American citizens."

After reviewing Section 25 and Section 28 (g) of the Immigration Act of 1924 and the definition of a non-immigrant in Section 3 containing the exception (6),

> "an alien entitled to enter the United States solely to carry on trade under and in pursuance to the provisions of a present existing treaty of commerce and navigation,"

the Court concludes that the wives and minor children were clearly not immigrants. Referring to the proviso of Section 13,

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * (3) is not an immigrant as defined in Section 3,"

the Court calls attention to the fact that the Courts for more than a generation have construed Art. II of the treaty to read,

> "Chinese merchants * * * together with their body and household servants, ***wives and minor children,*** shall be allowed to go and come. * * *."

The Judge concludes that the report of the Committee and the express provisions of the Act clearly show the intent of Congress not to disturb the relations existing under the prior laws. He considers that the act, the treaty and immigration laws, the judicial construction of the treaties and law and departmental construction, must all be considered together and, so regarding it, the Court would be slow to assume that Congress intended to treat the treaty as a "scrap of paper." The Judge at this point cites *Chew Heong* vs. *United States,* 112 U. S., 536; *United States* vs. *Gue Lim, supra.* He therefore directed the writ to issue.

In the case of Chiu Shee before Judge Lowell of the District Court of the United States for Massachusetts, the same conclusion was reached. 1 F. (2d) 798. The Judge thought that a casual reading of the statute would show that the writ would have to be denied, but adopting the attitude toward such legislation of the Supreme Court of the United States, in the leading case of *Holy Trinity Church* vs. *United States,* 143 U. S., 457, arrived at a contrary conclusion. He felt that the result desired by the passage of the act would not be furthered by prohibiting a wife from joining her husband who was a citizen of the United States by virtue of birth, citing *United States* vs. *Wong Kim Ark,* 169 U. S., 649, and that such prohibition would make the American citizen discontented with his American citizenship, being deprived of the society

of his wife to which he was entitled. *Tsoi Sim* vs. *United States,* 116 Fed., 920, and cases cited.

Scrutinizing the provisions of the Act he found they were inconsistent one with another, section 4 relating to non-quota immigrants referring to

> "an immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9,"

with clause (c) of Section 13, providing that

> "no alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or," etc.

He noted that in this part of Section 13, reference to subdivision (a) of Section 4 was not included and on such omission the assumption was based Congress forbade the entry of the wives of American citizens if they be not eligible to naturalization. This contention, he thought, rested upon an insecure foundation, and arose from a literal construction of the Act without seeking to ascertain its meaning. He thought that the result of such a construction would be that Congress showed more solicitude for the welfare of alien ministers or professors whose wives were allowed to enter than for American citizens and such result would be absurd and that the Act was not to be so construed as to lead to absurdities. This on authority of

Lau Ow Bew vs. *United States,* 144 U. S., 47, and *Holy Trinity Church* vs. *United States, supra.* Nor did he think such a construction necessary. He felt that in considering Section 13 Congress had only aliens in mind and did not realize that the section, as passed, diminished the rights of American citizens already carefully safeguarded in Section 4 (a). The reason why the inconsistency was overlooked was that the report of the House Committee stated specifically that wives of American citizens were exempted and the Chairman of the Committee emphasized that feature of the Bill (Cong. Record 565, No. 93, p. 5851). In this manner the discrepancy was overlooked. He construed later provisions (Section 13 (c)) as applying only to aliens not related to American citizens. He followed expressly the decision of Judge Neterer insofar as it related to the case at bar.

After citing numerous cases in the Supreme and other Federal Courts where the Court had interpreted the statutes liberally in favor of immigrants he directed the discharge of the petitioner.

In the instant case Judge Kerrigan, 2 F. (2d) 995, held as follows:

> "As to case No. 18417, it has already been stated that the Secretary of Labor dismissed the appeal of petitioners upon the ground that being aliens ineligible to citzenship, although the wives of American citizens of the Chinese race, they were excluded by section 13 of the Immigration Act.
>
> "It is of course apparent that the object of the act under consideration was to restrict the immi-

gration of aliens to an extreme degree; but it is equally clear that that object is not thwarted or its attainment even menaced by the admission of the wife and children ineligible to citizenship of an American citizen. Such cases must of necessity be comparatively rare, and must as the natural effect of existing legislation on the subject tend to become more so. Moreover, the act itself manifests a purpose to admit aliens who are the wives or children of American citizens, even though by their admission the number of aliens admitted from the country from which they come is thereby caused to exceed the quota prescribed for that country. And the act goes so far (sec. 4 subd. (d)) as to admit the alien wife and children ineligible to citizenship of an alien also ineligible to citizenship if he has entered or seeks to enter for the purpose of carrying on the avocation of a minister of religion or professor at a college, academy, seminary or university, thus plainly manifesting an intent not to disrupt family life even though its realization entails the admission of individuals belonging to a class not eligible to citizenship.

"The exclusion of persons ineligible to citizenship is accomplished under the act by section 13, subd. (c), which provides: 'No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the subdivisions (b), (d) or (e) of section 4, or (2) is the wife or unmarried child under 18 years of age of an immigrant admissible under such subdivision (d) and is accompanying him or following to join him, or (3) is not an immigrant as defined in section 3.'

"It will be seen by reference to the subdivisions or sections mentioned that all aliens ineligible to citizenship are thus excluded except (1) an immigrant previously lawfully admitted to the United States who is returning from a temporary visit

abroad; (2) an immigrant who continuously for at least two years preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the avocation of minister of any religious denomination, or professor of a college, academy, seminary or university, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him; (3) an immigrant who is a bona fide student of at least 15 years of age who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary or university, particularly designated by him and approved by the Secretary of Labor; (4) a government official, his family, attendants, servants and employees; (5) an alien visiting the United States temporarily for business or pleasure; (6) an alien in continuous transit throughout the United States; (7) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory; (8) a bona fide alien seaman serving as such upon a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman, and (9) an alien entitled to enter the United States under and in pursuance of the provisions of an existing treaty of commerce and navigation.

"I have already referred to subd. (a) of section 4, which allows to enter even in excess of the quota the alien wife or unmarried child under 18 years of age of a citizen of the United States, the term 'alien' of course including both those eligible and ineligible to citizenship.

"Although under the broad terms of section 13, subd. (c) of the act the wife ineligible to citizenship of an American citizen is excluded by reason

of not being included within the specific exceptions contained in that section, I cannot believe that it was the intention of Congress to exclude such person in view of the other provisions of the act referred to bearing upon the subject. To admit an alien teacher or minister of religion ineligible to citizenship, and their wives and minor children, also ineligible, and to exclude the wife of an American citizen solely by reason of a like ineligibility, is so inconsistent and unreasonable that it is impossible to believe that Congress intended it. As said by Judge Lowell, U. S. District Judge for the District of Massachusetts, in the case of *In re Chiu Shee,* upon this precise point (opinion filed October 17, 1924): 'The result of such a construction would be that Congress showed itself more solicitous for the welfare of an alien minister or professor, whose wife is allowed to enter, than for that of American citizens. Such a result would be absurd, and we are told by the highest authorities that an Act of Congress should not be so construed as to lead to absurdities (*Lau Ow Bew* vs. *U. S.,* 144 U. S., 47; *Holy Trinity Church* vs. *U. S.,* 143 U. S., 457, and cases cited).' Moreover, as pointed out by Judge Lowell in the case cited, when the bill resulting in this legislation was reported to the House the report of the House Committee stated specifically that wives of American citizens were exempted from the exclusion provisions of the bill (Congressional Record, Vol. 65, No. 93, p. 5851); and the discrepancy between section 4 (a) and section 13 (c) can be reconciled by construing the latter as applying only to aliens who are not the wives of American citizens.

"I conclude therefore that it would have been the duty of the respondent in the case now under consideration to permit the petitioners to enter if their husbands, being citizens of the United States, had complied with the provisions of section 9,

subd. (b), (c) and (d), of the act by filing with the Commissioner General the petition therein specified, resulting in the issuance to said petitioners of an immigration visa by the consular officer to whom application therefor had been made. But as it appears that no such proceedings were taken by or on behalf of the petitioners, they have not established their right to enter. The demurrer to the petition is therefore sustained."

Judge Kerrigan refused, as is shown, to discharge the petitioners because their husbands, being citizens of the United States, had not complied with the provisions of Section 9 (b), (c) and (d) of the Act by filing with the Commissioner-General the petition therein specified. Under apparently like conditions, Judges Lowell and Neterer failed to give any weight or attention to the theory on which Judge Kerrigan refused the writ to these petitioners.

We have pointed out in the statement of the case that under the rulings and regulations promulgated by the Commissioner-General, the Department of Labor had laid down the rule that no Chinese alien wife or alien child of the Chinese race of an American citizen was admissible solely because of such relationship to such person. It therefore plainly appeared that any application for certificate would have been refused under the direction of the Department of Labor and the non-doing of a vain act as we have shown, cannot well be accepted as a reason for the denial of a recognized right.

It is notable that each of the three trial judges before whom the question in these cases has been tried out found little difficulty in deciding to follow the spirit and intent of Congress rather than what they regarded as a faulty expression of the meaning of that body.

There was, therefore, left to us little more than to restate the argument as we saw it and to ask that in this connection the Court consider the more elaborate argument upon general principles contained in our Brief No. 769 hereto attached.

STATUS OF CHINESE WIFE OF AMERICAN-BORN CITIZEN BEFORE IMMIGRATION ACT OF 1924

The status of the Chinese wives of American-born citizens before the passage of the Immigration Act of 1924 deserves a moment's consideration. In a few words it may be said that on none of the few occasions when the power of the Court was invoked did the Court doubt that the domicile of the husband was that of the wife, and that, save for some consideration of health or conduct on her part, the right of the wife to join her husband was complete.

This was true in the case of *Tsoi Sim* vs. *United States*, 116 Fed., 920, when deportation of a Chinese wife was stayed in view of her marriage even after facts had arisen justifying her deportation had she not been the wife of an American citizen.

In *Looe Shee* vs. *North*, 170 Fed., 566, the right

of entry of the Chinese wife of an American citizen was recognized, and in *Low Wah Suey* vs. *Backus,* 225 U. S., 460, such right seems to have been tacitly conceded.

In the *Tsoi Sim* case the right of domicile was an important factor: "By virtue of their marriage her husband's domicile became her domicile, and thereafter she was entitled to live with her husband, and remain in this country." The right to become naturalized is, of course, an entirely different thing and not to be confused with rights and privileges incident to the marital state.

In the *Tsoi Sim* case the Court of Appeals also uses the following language:

> "By this act her status was changed from that of a Chinese laborer to that of a wife of a native-born American. Her husband is not before this Court, but his rights, as well as hers, are involved. * * * On the contrary, the native born, by virtue of his birth, becomes a citizen of the United States, and is entitled to greater rights and privileges than the alien merchant. The wife has the right to live with her husband; enjoy his society; receive his support and maintenance and all the comforts and privileges of the marriage relations. These are hers, as well as his, natural rights. By virtue of her marriage, her husband's domicile became her domicile, and thereafter she was entitled to live with her husband, and remain in this country."

In *Mackenzie* vs. *Hare,* 239 U. S., 299; 36 Sup. Ct., 106; 60 L. Ed., 297; Ann. Cas., 1916E, 645, it was held that identity of husband and wife is an ancient

principle of our jurisprudence. In *Tinker* vs. *Colwell,* 193 U. S., 473, 484; 24 Sup. Ct., 505; 48 L. Ed., 754, it was said of the exclusive right of the husband to marital intercourse and to beget his own children: "This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right." In *Anderson* vs. *Watt,* 130 U. S., 695, 706; 11 Sup. Ct., 449, 452; 34 L. Ed., 1078, it was held: "Whatever her citizenship, the domicile of the husband is that of the wife," and see cases cited therein. In *Maynard* vs. *Hill,* 125 U. S., 211, 217; 8 Sup. Ct., 723; 31 L. Ed., 654, it was held: "When the contract to marry is executed by the marriage, a relation is created which they cannot change."

Under the law and the decisions as they stood up to July 1, 1924, there could have been no doubt as to the right of admission to the United States of the petitioners, and the burden rests upon the Government of showing that the Act manifests a clear intent to change this condition.

GENERAL CONSIDERATIONS

In our Brief in No. 769 we have sought to show among other things that in passing the Act before us for consideration it was not the intent of Congress to legislate out of existence the Chinese Immigration laws, but rather to keep them in full operative effect, limiting the operations of the Act to the new field designed to be covered, that is Asiatics not embraced in the Chinese Immigration laws. This interpretation gives vigor to all existing acts and likewise gives full play to the new clauses of the Immigration Act. Accepting this view we have retained the old Chinese Exclusion laws and their well established interpretations, under which the petitioners would be entitled to admission now as formerly.

CONCLUSION

Before finally concluding this brief we feel constrained to say that we should not submit this matter without strongly emphasizing the fact that the husbands of the women in whose behalf the writs of habeas corpus in these matters are sought are citizens of the United States *permanently residing and domiciled therein,* and that their rights as such citizens are before this Court as petitioners and appellants, and that to hold that these women are debarred from admission to the United States under the Immigration Act of 1924 means that their husbands are to be permanently separated from them unless they abandon

the country of their birth and citizenship, and take up their residence in some other land which permits their wives to reside with them. The right of the husband to have the companionship of his wife is a natural right inherent not only in civilized, but even in savage society, and is founded upon those undying and unalterable natural laws and considerations upon which society itself rests, and goes back to the days when Eve was placed in the Garden of Eden, there to dwell with Adam, because the Lord felt that it was not good for man to be alone. We cannot believe that Congress intended to abrogate that right, particularly with respect to citizens of this country, and to compel them to choose between a permanent separation from their wives or that practical abandonment of their citizenship which is involved in a permanent residence abroad. The considerations involved here are different than in a case where the husband is an alien. The alien's residence here, because of his foreign citizenship, may be looked upon as more or less temporary, but with the citizen the case is different. His residence is here in the country of his citizenship and where he has a natural, inherent and constitutional right to reside. To say to him that his wife is not admissible here is to compel him to choose between his citizenship and its obligations on the one hand, and his natural duty to his wife and to himself as a husband on the other.

Any construction of the Immigration Act of 1924

which would lead to such consequences is certainly, we would submit, to be avoided as manifestly not being the intent of Congress, and it can be avoided by giving full effect to Section 4 of the act, the specific section dealing specifically with the wives of citizens, and providing for their admission, as of controlling persuasion over a literal construction of the language of Section 13, which is general in its nature, and should give way, if there be any conflict between the two sections, to the specific section which deals specifically with that specific matter. It should be borne in mind that all of the marriages here involved antedate the passage of the Immigration Act of 1924, and, therefore, it cannot be intimated that the relationship was assumed to avoid the provisions of that act.

SUMMARY

Let us sum up some of the more important points of the argument:

1. The petitioners should not have been rejected for the want of an immigration visa, the same being impossible of procurement under the Department's action and unavailing on its view even if obtained.

2. The Immigration Act of 1924 contemplated the granting of immigrant visas to the wives and children of American citizens irrespective of race, and so granting them could not be so interpreted as to compel the rejection of their bearers or of those enti-

tled to them if their issuance had been possible or permitted by regulation when appearing at an American port. The two propositions of being given or being entitled to visa and of subsequent refusal of entry are so inconsistent that the intent of Congress must be sought to discover the meaning of the Act.

3. The Committee reports and the expressions of views on the part of Chairmen show that it clearly was not the intention of Congress to keep out the wife of an American citizen on account of race or criteria other than those which extend to aliens generally.

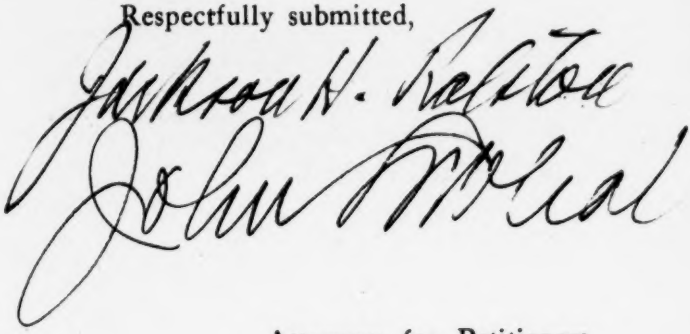
4. We have pointed out that until the passage of the present Act there was no pretense of authority for turning back from American ports the Chinese wife of an American citizen, and that the burden was upon the Government to show the clear intent of Congress to change this rule.

5. We have made the Brief in No. 769 a part of this Brief for the express purpose among other things of showing that Congress has not repealed the Chinese laws and that under them and their interpretation the petitioners are entitled to enter.

We have, therefore, to submit that the questions certified to this Court should each be answered in the negative—that is to say, that the petitioners should not have been denied "Because of the want of a visa," and that they should not have been denied, "Because of

want of right of admission if found to be Chinese wives of American citizens."

Respectfully submitted,



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